85-901

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

DWIGHT SHEFFER, LARRY KREBBS, and MICHAEL KREBBS, as Members of the Board of Trustees of Canton Township, Stark County, Ohio,

Petitioners,

vs.

RICHARD MALLONN, Auditor, City of Canton, Ohio and JAMES BOWE, Agent for Annexation Petitioners,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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November 22nd, 1985

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED FOR REVIEW

1. Does the concept of federalism result in states enjoying absolute immunity from federal judicial scrutiny of violations of the *Fifth and Fourteenth Amendments'* rights to due process and equal protection of the law, in all matters involving political subdivision boundary changes?

2. Does the procedural due process requirement of the *Fifth and Fourteenth Amendments* require the allowance of cross-examination of witnesses, and (upon request) the subpoenaing of witnesses at annexation public hearings?

For the reasons enunciated herein, petitioners believe the answer to issue one (1) must be no; that the answer to issue two (2) must be yes.

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To the Supreme Court of Ohio

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Dwight Sheffer, Larry Krebbs, and Michael Krebbs, as the Board of Trustees of Canton Township, Stark County, Ohio hereby petition this honorable court for a writ of certiorari to review a judgment and opinion of the Ohio Supreme Court rendered in this cause on July 31, 1985, and respectfully show:

OPINIONS IN THE COURTS BELOW

The Ohio Supreme Court's opinion: *Dwight Sheffer, et al. v. Richard Mallonn, et al.* (July 31, 1985), Unreported. Copy of the opinion and judgment attached as Appendix

A2. The Ohio Supreme Court granted a stay, pending this action in the United States Supreme Court on August 23, 1985. Copy of the stay attached as Appendix A1.

The Court of Appeals' opinion: *Dwight Sheffer, et al. v. Richard Mallonn, et al.* (March 25, 1985), Unreported. Copy of the opinion and judgment attached as Appendix A3; Appendix A4 thru A9.

The Common Pleas Court's opinion: *Dwight Sheffer, et al. v. Richard Mallonn, et al.* (December 18, 1984), Unreported. Copy of the opinion and judgment attached as Appendix A9 thru A14; Appendix A15.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was dated and entered July 31, 1985. No application for rehearing was made. The statute conferring on this court jurisdiction to review such judgment by writ of certiorari is 28 U.S.C. 1257(3).

Respondents will argue that this Court has no jurisdiction because the federal constitutional question was not formally assigned as error at the first appellate level. They will be wrong for reason that the Appeals Court reached and decided the constitutional issues by unanimously incorporating the Trial Court's decision into its opinion. This action creates an irrefutable presumption that the federal question was properly raised.

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not in-

quire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

Charleston Federal Savings & Loan Ass'n. v. Alderson, 324 U.S. 182, 185-186.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States, pertinent portions of which provide:

". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution of the United States, pertinent portions of which provide:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES INVOLVED

28 U.S.C. 1257(3), which provides in pertinent part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATE STATUTES INVOLVED

Section 709.01, et seq., Ohio Revised Code. See Appendix A29 thru A41.

STATEMENT OF THE CASE

Appellants, Canton Township Board of Trustees, objected to the annexation of 163.21 acres of land from the Township to the City of Canton. At the Annexation Public Hearing before the Stark County Commissioners, the Trustees requested the right to cross-examine witnesses, and renewed their prior request for the Commissioners to subpoena witnesses. Both requests were denied. The Trustees appealed to the Stark County Common Pleas Court, alleging denial of substantive and procedural due process rights under the Fourteenth Amendment of the United States Constitution, together wih state grounds for appeal. In addition, the Trustees alleged a constitutionally protectible legal right or interest in the annexation.

The Trial Court, at conclusions of Law 1, 2, and 3 overruled all federally grounded objections (See order of Trial Court, Appendix A15 and A16).

The Fifth Ohio Appellate District affirmed the Trial Court, and incorporated by reference into its opinion the findings of fact and conclusions of law of the Trial Court. Thus, the Fifth Ohio Appellate District rejected the federally grounded constitutional challenges, and made same precedential law in the Fifth Ohio Appellate District (See Appendix A4 thru A9).

This case began when Appellee, James Bowe, Director of the City of Canton's Department of Planning and Zoning (hereinafter Bowe) filed a petition pursuant to O.R.C. 709.02 to annex 163.21 acres of land in Canton Township to the City of Canton.

Pursuant to O.R.C. 709.033, a hearing before the Stark County Commissioners was set for August 24, 1983. All three (3) Canton Township Trustees appeared at that annexation hearing, together with their legal counsel, Attorney Darlene O'Dar.

Counsel for Appellants, Trustees, requested the Board of Commissioners to allow her to cross-examine adverse witnesses. The Commissioners refused, saying ". . . we'll not conduct a hearing on the basis of cross examination . . ." Tr. p. 6.

Counsel for Appellees, the annexation proponents, apparently realized the Commissioners' denial of due process, saying:

> "*By Mr. Brahm*: I have rested. I want to make sure that no one's rights in the room are cut off. If there is any cross examination of any of the witnesses here or if counsel would like to see any of the

people that are here including affidavits of the department heads and any of the property owners. I understand your problems getting into the legal aspect. If she questions through you and wants to call them and have them answer the questions, that's fine with me. I don't intend to cut off anybody's rights." Tr. p. 21.

The Board of Commissioners again refused cross-examination by Appellants' counsel.

The Stark County Commissioners denied Appellants the right to cross-examination at the annexation hearing. They even rejected the offer of the attorney for the annexation proponents to allow cross-examination of his witnesses. The Commissioners' denial of the right to cross-examination was apparently based on their unfounded fear that they would have to rule on objections. Commissioner Watkins stated in pertinent part:

"*By Mr. Watkins*: In that we'll not conduct a hearing on the basis of cross examination for this reason. None of the three of us, sitting here, are lawyers nor judges, and while we have a fair degree of familiarity with the law, I don't think that we are willing to place ourselves in a position at a public hearing which is for the purpose of inducing as much input for our benefit and judgment as possible. I don't believe we are willing to put ourselves in a position of jousting with counselors-at-law whose knowledge of the law is so much greater than ours that we'd end up at a disadvantage and end up making rules that are questionable in cross examination that which may be argued by the opponents and having to make continual rulings to the justification and rulings on objections. The procedures of the law, as you are well aware, are very complicated and I don't think that we are

about to put ourselves in that kind of a trick bag." Tr. p. 6.

This is not sufficient reason to deny due process of law to a party to the annexation hearing. Indeed, due process could have been preserved and the Commissioners could have avoided their feared "trick bag" by allowing cross-examination under the method used at oral depositions pursuant to Ohio Civil Rule 30, which is analogous to Federal Rule of Civil Procedure 30(C).

Like oral depositions, annexation hearings are transcribed by a Court Reporter. As with oral depositions, objections could be made and preserved, allowing any reviewing court to rule later on the objection, while permitting the hearing to go forward. Thus, cross-examination could easily have been allowed, and procedural due process rights granted, at no undue cost to the State.

The Commissioners' decision was issued on November 22, 1983. The decision approved the annexation, but made only one finding: that the annexation was for the general good of the territory sought to be annexed.

O.R.C. 709.033 mandates that the County Commissioners make four separate findings as conditions precedent to granting an annexation petition. After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that:

"(A) The petition contains all matter required in Section 709.02 of the Revised Code.

(B) Notice has been published as required by Section 709.031 [709.03.1] of the Revised Code.

(C) The persons whose names are subscribed to the petition are owners of real estate located in the

territory in the petition and as of the time the petition was filed with the board of county commissioners the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed.

(D) The territory included in the annexation petition is not unreasonably large; the map or plat is accurate; and the general good of the territory sought to be annexed will be served if the annexation petition is granted."

Appellants timely filed an O.R.C. 709.07 injunctive action to prevent the City of Canton from accepting the annexation on January 27, 1984. The Trial Court issued a Stay Order that same day. The Township alleged the failure to permit cross-examination of witnesses at the annexation hearing before County Council was error for purposes of O.R.C. 709.07(D)(1), as was the failure of the County Commissioners to make the findings required by O.R.C. 709.033 prior to their decision allowing the annexation.

For purposes of O.R.C. 709.07(D), the Township showed the annexation would adversely affect its legal rights or interests in that (a) it would adversely impact on the Township tax base; (b) it would create a burden on the Township in regard to Township roads that provide access to the area to be annexed, but which the annexation petition leaves in the Township. This would result in a demand to upgrade the roads to serve the annexed area, at the same time, the Township's resources are reduced by the annexation tax loss; (c) negatively impact on the Township's exercise of its clear legal rights under Section 505.62, O.R.C.; (d) it would prevent the Township from obtaining judicial correction of plain error in the annexation proceedings before the Stark County Commissioners.

The Trial Court denied the injunction by Journal Entry dated December 18, 1984.

Appellants appealed to the Fifth District Court of Appeals on December 18, 1984, and obtained a Stay Order pending appeal that same day.

The Court of Appeals issued its decision denying the injunction on March 25, 1985, and incorporated into its decision the Separate Findings of Fact and Conclusions of Law of the Trial Court.

A Notice of Appeal to the Ohio Supreme Court was filed on April 22, 1985, with the Fifth District Court of Appeals. The Ohio Supreme Court refused to hear the appeal on July 31, 1985, but granted a Stay Order delaying final action on the annexation, pending action by the United States Supreme Court on an appeal, or petition for writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

1. Lower Federal Courts, And State Courts Throughout The United States, Wrongly Rely On *Hunter v. Pittsburgh*, 207 U.S. 161 (1907) For The Proposition That State Action In Regard To Political Subdivision Boundary Changes Is Immune From Federal Judicial Scrutiny, Violations Of Federally Guaranteed Constitutional Rights Notwithstanding. This Case Provides The Court With The Opportunity To Review *Hunter* In Light Of Modern Constitutional Principles, And In Light Of Present Concepts of Federalism.

2. (a) The Ohio Courts Erred In Finding That The Canton Township Board Of Trustees Had No Constitutionally Protected Property Rights In The Annexa-

tion, And Thus Applied O.R.C. 709.07 In A Manner That Resulted In A Taking Of Property Without Due Process Or Just Compensation, In Violation Of The Fourteenth Amendment To The United States Constitution.

(b) The Ohio Courts Erred In Upholding The Action Of The Stark County, Ohio Commissioners' Denial Of Cross-Examination Rights And Refusal To Subpoena Witnesses Applying O.R.C. 709.01 Et Seq. In A Manner Violative Of The Fifth And Fourteenth Amendments Of The United States Constitution, As To Procedural Due Process Rights.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS TO THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO REVIEW HUNTER v. CITY OF PITTSBURGH, 207 U.S. 161, 28 S. CT. 40, 52 L. ED. 151 (1907).

This case is considered the seminal case in the area of the application of federal constitutional rights to annexation proceedings. The case pre-dates the application of the Bill of Rights to the States through the Fourteenth Amendment of the United States Constitution. As such, the *Hunter* case cries out for review and modification by the United States Supreme Court.

Hunter states, in pertinent part as follows:

> "The state, therefore at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold itself, or vest it in other agencies, expand or contract the territorial area, unite

> the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens or even against their protest. In all these respects, the state is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise to the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." 207 U.S. at 178, 179, 28 S. Ct. at 46, 47.

Hunter at 28 S. Ct. 45 also makes the pronouncement that "The Fifth Amendment to the Federal Constitution is not restrictive of state . . . action." In light of the the decisions of this Court since 1907, applying the Fifth Amendment and other portions of the Bill of Rights of the United States Constitution to the states through the Fourteenth Amendment this pronouncement is outdated.

There is no reason for exempting annexation procedures from the requirements of equal protection which apply to all other areas of state legislative activity.

Under modern constitutional theory, there is no reason for the continued validity of the *Hunter* case, which appears to confer absolute immunity from judicial scrutiny

upon all changes which a state may make in its political subdivision boundaries. Petitioners doubt that the United States Supreme Court would currently grant such absolute immunity from federal judicial scrutiny.

The United States Supreme Court has found cases involving political subdivision boundaries to involve justiciable constitutional issues. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). Yet, lower courts continue to rely on *Hunter* for the proposition that state political subdivision boundary changes are *not* subject to federal judicial scrutiny to determine if said boundary changes comply with the United States Constitution.

The United States District Court for the Southern District of Ohio reviewed several such decisions in *Jefferson Tp. v. City of West Carrollton*, 517 F. Supp. 417 (1981) at 419-420.

> "The United States Court of Appeals for the Sixth Circuit had occasion to pass upon the viability of *Hunter* in two decisions rendered within weeks of each other in 1967. In *The Detroit Edison Company v. East China Township School District, No. 3*, 378 F. 2d 225, cert. denied, 389 U.S. 932, 88 S. Ct. 296, 19 L. Ed. 2d 284 (1967), the Court affirmed the district court's reliance upon Hunter for the proposition that '(A)ny alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution', leading to the conclusion that the annexation procedure followed was a legislative matter not justiciable under the due process or equal protection clauses of the Fourteenth Amendment. The court pointed out that, as of that time, both the Fifth and

Tenth Circuits had had occasion to pass on cases where the constitutionality of a state annexation procedure was raised and, in both cases, the appellate courts relied upon *Hunter* in affirming dismissal of their respective cases. *Hammonds v. City of Corpus Christi*, 343 F. 2d 162 (5th Cir.), cert. denied, 382 U.S. 837, 86 S. Ct. 85, 15 L. Ed. 2d 80 (1965); *International Harvester Co. v. Kansas City*, 308 F. 2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948, 83 S. Ct. 503, 9 L. Ed. 2d 498 (1963). In *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F. 2d 321 (6th Cir.), cert. denied, 389 U.S. 975, 88 S. Ct. 476, 19 L. Ed. 2d 467 (1967), the Court upheld a trial court decision to the effect that *Hunter* precludes constitutional challenge under the Fourteenth Amendment from annexation by municipal corporations of adjoining territories on the basis of the procedure employed or authorized by the state regardless of the pecuniary repercussions from taxation, etc. . . ."

These interpretations do not square with recent United States Supreme Court pronouncements regarding the federalist principles involved in the United States Constitution. *See, for example, Garcia v. San Antonio Metropolitan Transit Authority*, ... U.S. ....., 105 S. Ct. 1005 (1985).

A grant of the requested time extension will permit undersigned counsel to fully and properly prepare a petition for writ of certiorari, so that this Court may review *Hunter*, and modify it to conform to modern constitutional principles.

Of course, Petitioner will urge that the United States Supreme Court take the same view as expressed by Mr. Justice Frankfurter in *Gomillion v. Lightfoot*, 364 U.S. 342, 344, 81 S. Ct. 125.

Further, the questions raised in this case are of paramount importance to millions of citizens and property owners in the United States, whose properties in unincorporated areas are being annexed by neighboring municipalities.

The absentionist position of the *Hunter* court, has been counter productive to the goals of the federalism. Instead of fostering experimentation in governmental subdivision structure among the states, it has resulted in municipal forms of government destroying viable and effective town and township forms of government. Federalist doctrine would, in its purest sense, encourage the establishment of units of government that provide basic services at low cost as alternatives to big city, big government municipalities. Instead, the doctrine as applied in the *Hunter* case has resulted in the destruction of such governmental units.

2. THE PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIREMENT OF THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THE ALLOWANCE OF CROSS-EXAMINATION OF WITNESSES AT (AND UPON REQUEST, THE SUBPOENAING OF WITNESSES TO) THE ANNEXATION PUBLIC HEARINGS BEFORE THE COUNTY COMMISSIONERS.

Ohio law specifically creates a right to a public hearing on annexations: See O.R.C. 709.031 and O.R.C. 709.032, Appendix, pages A33, A34 and A35.

Ohio law also specifically provides that a Township Board of Trustees may be represented at such hearing:

> "A board of township trustees may enter into a contract with, and appropriate township general revenue fund moneys for the services of, an attorney be-

> fore the board of county commissioners and upon any appeal of the board's decision pursuant to Section 709.07 of the Revised Code." O.R.C. Section 505.62.

Once state law creates a right to a public hearing (that is, an intangible property right), the public hearing must conform to the due process requirements of the Fourteenth Amendment. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

As this Court stated in *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972):

> "We have made clear in *Roth* . . . that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, property denotes a broad range of interests that are secured by 'existing rules or understandings' . . . A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Based on Ohio law, the Board of Trustees, in its representative capacity, appeared at the public hearing. Once there, they were denied both the right to subpoena witnesses or to cross-examine those few witnesses that the annexation proponents voluntarily provided.

Ohio statutes provide for: (1) a public hearing, (2) a Board of Township Trustees to participate in said hearings, and (3) to be represented by counsel at the hearing.

These rights ring hollow where, as here, no cross-examination or subpoenaing of witnesses was permitted at the state granted public hearing.

It has long been the law that the fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783, and 58 L. Ed. 1363 (1914).

The opportunity to be heard includes the right to cross-examine witnesses. Obviously, if not permitted to subpoena witnesses, one may not have anyone to cross-examine. This is of no concern to the Ohio courts below, as they did not permit cross-examination at said public hearing.

> "Thus, a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures."

Goldberg v. Kelly, 379 U.S. 254 at 265, 90 S. Ct. 1011 (1970).

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E. g., ICC v. Louisville & N. R. Co., 227 U.S. 88, 93-94, 33 S. Ct. 185, 187-188, 57 L. Ed. 431 (1913) . . . What we said in Greene v. McElroy, 360 U.S. 474, 496-497, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959), is particularly pertinent here:
>
> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary

evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'"

Goldberg v. Kelly, 379 U.S. 254 at 269-270, 90 S. Ct. 1011, 1021 (1970).

That same case stands for the position that the finding of the hearing officer must state the reasons for his determination and indicate the evidence relied on:

"Finally the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292, 57, S. Ct. 724, 81 L. Ed. 1093 (1937); United States v. Abilene & S. R. Co., 265 U.S. 274, 288-289, 44 S. Ct. 565, 569-570, 68 L. Ed. 1016 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. PUC, 260 U.S. 48, 57-59, 43 S. Ct. 51, 54-55, 67 L. Ed. 124 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. In re Murchison, 349

U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, 45-46, 70 S. Ct. 445, 451-452, 94 L. Ed. 616 (1950)." *Goldberg v. Kelly* at 271.

The Courts below ruled that no such findings were required by the County Commissioners.

The property right involved herein springs from two (2) separate theories.

The first, set forth above, is that once Ohio law granted a public hearing in annexation matters, and by statute provides for citizens, as represented by their Board of Trustees, to be present and represented by legal counsel at said hearing, the hearing must conform to procedural due process requirements. Otherwise, the hearing contemplated by Ohio law is a mere sham.

The second property interest is that of the citizens of the township to maintain the territorial integrity of the township; to preserve the tax base of the township, and avoid the burden of additional tax expenditures to improve public facilities, such as roads, that remain in the township after the potentially tax productive land is annexed. In this regard, annexation hearings are akin to appropriations of land. That is, the citizens of the township stand to lose tax productive land. Perhaps, these property interests motivated the Ohio legislature to provide the O.R.C. 709.033 hearing, and the right to counsel as provided by O.R.C. 505.62.

> "The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S. Ct. 1820, 1823, 23 L. Ed. 2d 349 (1969).

Interestingly, the Ohio Courts below view the due process rights afforded townships in annexation matters to be *less* important and require *less* procedural due process protection than that afforded a high school student's interest in a one (1) day suspension from school. *See Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

CONCLUSION: RELIEF REQUESTED

Petitioners respectfully pray the Court grant the Petition for Certiorari to the Ohio Supreme Court, in order to review the questions raised therein, and in order that we may enjoy the opportunity to persuade the Court as to the correctness of our position on these views.

Respectfully submitted,

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November 22nd, 1985

APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO GRANTING STAY

(Dated August 23, 1985)

Case No. 85-771

THE SUPREME COURT OF OHIO
COLUMBUS

BOARD OF TRUSTEES OF CANTON TOWNSHIP *et al.*,
Appellants,

v.

RICHARD MALLONN *et al.*,
Appellees.

ENTRY

UPON CONSIDERATION of the motion filed by counsel for appellants to stay the execution of judgment in the above-styled cause pending the timely filing of an appeal to The Supreme Court of the United States,

IT IS ORDERED that said motion be, and the same is hereby, granted.

IT IS FURTHER ORDERED that if such appeal is timely filed in the Supreme Court of the United States, this stay shall continue pending final disposition of this cause by The Supreme Court of the United States.

/s/ FRANK D. CELEBREZZE
Chief Justice

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY AND DISMISSING APPEAL

(Dated July 31, 1985)

Case No. 85-771

THE SUPREME COURT OF OHIO
COLUMBUS

BOARD OF TRUSTEES OF CANTON TOWNSHIP *et al.*,
Appellants,

v.

RICHARD MALLONN *et al.*,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Stark County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Alfred Schrader.

/s/ FRANK D. CELEBREZZE
Chief Justice

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR STARK COUNTY, OHIO

(Filed March 25, 1985)

Case No. CA-6535

IN THE
COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BOARD OF TRUSTEES OF CANTON TOWNSHIP,
Plaintiff-Appellant

vs.

RICHARD MALLONN *et al.*,
Defendants-Appellees

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County is affirmed.

/s/ JOHN R. MILLIGAN
/s/ JOHN R. HOFFMAN
/s/ IRA G. TURPIN
Judges

OPINION OF THE COURT OF APPEALS FOR STARK COUNTY, OHIO

(Filed March 25, 1985)

Case No. CA-6535

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BOARD OF TRUSTEES OF CANTON TOWNSHIP,
Plaintiff-Appellant,

vs.

RICHARD MALLONN, *et al.*,
Defendants-Appellees.

OPINION

MILLIGAN, *P.J.*

ANNEXATION, R.C. 709.07—TOWNSHIP CHALLENGE—ADEQUACY OF COUNTY COMMISSIONER ORDER

Upon application of all of the owners of 163 acres, located in Canton Township, adjacent to the City of Canton, the Stark County Board of Commissioners, following a hearing at which protracted testimony was given (including township trustees' objections), adopted a resolution approving the annexation.

By favor of R.C. 709.07 the Board of Trustees of Canton Township sought an injunction against Auditor of the City of Canton and the agent for the landowners-petitioners enjoining them from "taking further action whatsoever with reference to the annexation and from laying

the transcript of said annexation proceedings and the accompanying plat or map, before the council of the City of Canton, and such other relief to which plaintiff may be entitled."

Bench trial was held in the Court of Common Pleas of Stark County, following which the court issued separate findings of fact and conclusions of law and dismissed the complaint for injunction. The trustees appeal, assigning two errors:

> I. THE TRIAL COURT ERRORED [sic] IN FINDING THAT APPELLANTS FAILED TO PROVE THAT ITS LEGAL RIGHTS OR INTERESTS WERE IMPAIRED BY THE ANNEXATION.
>
> II. THE TRIAL COURT ERRORED [sic] IN FINDING THAT THE RESOLUTION PASSED BY THE STARK COUNTY BOARD OF COMMISSIONERS MET ALL THE REQUIREMENTS OF O.R.C. 709.033.

We attach and incorporate the trial court's separate findings of fact and conclusions of law.

I

The first assignment of error challenges conclusion of law number one, i.e. the plaintiffs failed to prove by clear and convincing evidence that they had a legally recognizable right or interest that would be impaired by the annexation.

It is conceded that the Board of Township Trustees, within whose jurisdiction land is approved for annexation to a municipality, may seek injunctive relief pursuant to R.C. 709.07 and 709.032. *Appeal of Bass Lake Community, Inc.* (1983), 5 Ohio St. 3d 141, 449 N.E. 2d 771, syllabus 3. ("Standing," the right to sue, is no longer an issue.)

The question is whether the petitioner Board of Trustees have met the burden imposed by R.C. 709.07(D).

> The petition for injunction shall be dismissed unless the court finds the petitioner has shown by clear and convincing evidence that the annexation would adversely affect the legal rights or interests of the petitioner, and that: 1. There was error in the proceedings before the county commissioners pursuant to §709.032 or 709.033 of the Revised Code, or that the board's decision was unreasonable or unlawful; **or** . . . .
>
> R.C. 709.07(D)

(Appellant inaccurately quotes R.C. 709.07(D) at page five of its brief by failing to include the conjunctive "and".)

The decision of the common pleas court that the trustees failed to prove by clear and convincing evidence that the annexation would adversely affect its legal rights or interests and was not unreasonable or unlawful is neither an abuse of discretion, contrary to law, or against the manifest weight of the evidence. Compare *Lariccia v. Board of Commissioners* (1974), 38 Ohio St. 2d 99 (emphasizing the decision is to be made in the general good of the territory sought to be annexed); *In re Kucharski* (1977), 56 Ohio App. 2d 121 (the desires of the owners seeking annexation are to be given greater weight than those of residents outside the territory); *In re the Annexation of 109.528 Acres of Land in Perry Twp.* (1983), Stark App. No. CA-6206, unreported (where the fact pattern was substantially similar to the case *sub judice*); *McClintock v. Cain* (1956) C.P. 74OLA554 (tax duplicate reduction no valid objection); *Post v. Cain* (1956), C.P., 154 N.E. 2d 185.

The first assignment of error is overruled.

II

The second assignment of error challenges the common pleas court determination that the county commissioners made the prerequisite findings enumerated in Subsections A thru D of R.C. 709.033.

> After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if its finds that: . . . . (4 criteria enumerated).
>
> R.C. 709.033.

The county commissioners' resolution of November 22, 1984, does not affirmatively spell out the four finding criteria called for in R.C. 709.033. It simply recites:

> WHEREAS, James M. Bowe, filed an annexation petition with this Board on June 7, 1983 proposing to annex 163.21 acres of Canton Township to the City of Canton, popular name of such territory being the Canton Industrial Park; and
>
> WHEREAS, as required by law, a public hearing on such annexation was held by this Board on August 24, 1983; and
>
> WHEREAS, this Board has examined the arguments both for and against such annexation.
>
> NOW, THEREFORE, BE IT RESOLVED:
>
> That this Board hereby determines the general good of the territory sought to be annexed will be served if granted, and hereby approves said annexation.
>
> Upon roll call the vote resulted as follows:
>
> MR. WATKINS — YES MR. SPONSELLER — NO
> MR. PATRICK — YES

In the trial upon the complaint for injunction, the trial court heard evidence from the county commissioners establishing that they did consider and rule favorably upon all the criteria enumerated in 709.033. The trial court acted within its discretion and consistent with the evidence and its findings of fact in that regard—i.e. the record now affirmatively demonstrates that the four findings were made.

The assignment of error extrapolates from the specific language of the statute the implication that the four criteria must be affirmatively found in writing upon the resolution of the county commissioners in much the same fashion as a court would make separate findings of fact prior to its conclusions of law in a case tried to the court without a jury.

This is not what the statute says and we resist the invitation to read such a requirement into R.C. 709.033.

The common pleas court cases cited by the appellant are clearly distinguishable. In *Dayton v. McPherson* (1969), 29 Ohio Misc. 190, the record affirmatively demonstrated that the county commissioners had failed to even consider the criteria of the statute. *Akron v. Frey*, Summit Co. C.P. Case No. CV-80-10-2843, unreported, involved the trial court determining that the county commissioners' transcript "wholly fails to establish that the area to be annexed is not unreasonably large . . . . and fails to show that the annexation would serve the general good."

In the case *sub judice*, not only is the record before the county commissioners replete with evidence, including the testimony of trustees relative to each of the criteria, but the testimony presented to the common pleas court affirmatively demonstrates that the county commissioners

did consider and make the appropriate threshold requirements as a condition of exercising their statutory discretion.

The second assignment of error is overruled.

The judgment of the Court of Common Pleas of Stark County is affirmed.

HOFFMAN, J. and
TURPIN, J. concur.

/s/ JOHN R. MILLIGAN
/s/ JOHN R. HOFFMAN
/s/ IRA G. TURPIN
Judges

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COMMON PLEAS COURT OF STARK COUNTY, OHIO

(Filed December 18, 1984)

Case No. 84-0145

IN THE COURT OF COMMON PLEAS
OF STARK COUNTY, OHIO

BOARD OF TRUSTEES OF CANTON TOWNSHIP,
Plaintiffs,

vs.

RICHARD MALLONN, *et al.*,
Defendants.

SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on before the Court for hearing on October 31, 1984, on the Complaint for Injunction as filed by Plaintiffs against Defendants, and the

Court having heard the evidence as offered by the parties, reviewed the exhibits as admitted, and the briefs as filed by the parties, and the Plaintiffs having filed a request on December 3, 1984, for separate findings of fact and conclusions of law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On June 7, 1983, a petition for annexation to the City of Canton was filed with the Board of Commissioners of Stark County, praying for the annexation of 163.21 acres, more or less, of land in Canton Township, Stark County, Ohio, and in which James M. Bowe was named agent for the petitioners. A public hearing was held by the Board of Stark County Commissioners on the petition on August 24, 1983. The annexation petition was approved by the Board of Commissioners on November 22, 1983.

2. The annexation petition was filed upon petition of the land owners and was signed by all of the land owners. The land owners appointed James Bowe as agent. The land owners and the individuals who signed were: Mr. Lloyd W. Smail; Metropolitan Ceramics, Inc., by J. Steven Renkert; Metropolitan Industries, Inc., by J. Steven Renkert; H.P. Products, Inc., by Paul R. Bishop; Sunfield, Ltd., by Caroman Corporation, its General Partner, by Carl Sorenson; Canton Industrial Park, by Caroman Corporation, its General Partner, by Carl Sorenson. The persons whose names were subscribed to the petition were owners of the real estate or individuals authorized to sign for the owners of the real estate located in the territory in the petition.

3. The number of valid signatures on the petition constituted a majority of owners of real estate in the territory to be annexed.

4. The petition included a statement of the number of owners of real estate in the territory to be annexed.

5. The map/plat accompanying the annexation petition is accurate, and the petition contains a full description of the territory to be annexed.

6. The notice of annexation was published in *The Repository* on June 30, July 7, 14, and 21, 1983.

7. Plaintiffs filed a motion requesting that the Board of Commissioners issue subpoenas and allow Plaintiffs to cross-examine witnesses, make objections, and offer rebuttal testimony at the hearing. This motion was served on the Commissioners two (2) days before the hearing and was not served on the Defendants.

8. There was no limitation at the annexation hearing as to the length of giving testimony, rebuttal testimony, summation, and commenting on the testimony.

9. Plaintiffs were permitted to ask any questions at the annexation hearing.

10. Plaintiffs were permitted to make objections to testimony at the annexation hearing.

11. The territory included in the annexation is not unreasonably large.

12. The annexation petition contained all matters required by Section 709.02, Ohio Revised Code.

13. The general good of the territory to be annexed will be served by the annexation.

14. The City of Canton is capable of providing services to the territory to be annexed.

15. The Board of County Commissioners found that the petition contained all required matters, that the notice

of annexation had been properly published, that the persons whose names were subscribed to the petition were owners of the real estate located in the territory in the petition, that as of the time the petition was filed with the Board of Commissioners, the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed, that the territory included in the annexation was not unreasonably large, that the map or plat was accurate and that the good of the territory to be annexed will be served by the annexation before the Board passed the Resolution permitting the annexation.

CONCLUSIONS OF LAW

1. Plaintiffs failed to prove by clear and convincing evidence that in this case they had a legally recognizable right or interest that would be impaired by the annexation.

2. The due process requirements of an annexation hearing before the Board of County Commissioners are a reasonable notice and a fair opportunity to be heard and does not require the Board of Commissioners to subpoena witnesses or allow cross-examination at the annexation hearing.

3. The refusal of the Board of County Commissioners to subpoena witnesses, and the failure to allow the Township to cross-examine witnesses at the annexation hearing was not error because there was no limitation at the annexation hearing as to the length of giving testimony, rebuttal testimony, summation, and commenting on the testimony.

4. Denial of Plaintiffs' motion requesting specific procedures at the annexation hearing caused no prejudice.

5. The annexation petition was properly brought under Section 709.02 et seq., Ohio Revised Code, as an annexation upon the application of land owners.

6. The notice of annexation was published as required by Section 709.031, Ohio Revised Code.

7. The map/plat accompanying the annexation petition is accurate, and the petition contains a full description of the territory to be annexed.

8. The annexation petition contained all matters required by Section 709.02, Ohio Revised Code.

9. The resolution of the Board of County Commissioners passed by the Board of Commissioners on November 22, 1983, met the requirements of Section 709.033, Ohio Revised Code.

10. The failure of the Board of County Commissioners to list items deemed necessary by Plaintiffs in the Commissioners' order granting the annexation caused no prejudice because the Commissioners specifically found that the petition contained all matters required in Section 709.02, Ohio Revised Code, the notice of annexation was published as required by Section 709.031, Ohio Revised Code, the persons whose names were subscribed to the petition were owners of the real estate located in the territory in the petition, as of the time the petition was filed with the Board of Commissioners, the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed, the territory in the annexation petition was not unreasonably large, the map or plat was accurate, and the good of the territory to be annexed will be served.

11. The area to be annexed, 163.21 acres, more or less, is not unreasonably large.

12. The good of the territory to be annexed will be served by the annexation.

13. The Plaintiffs were permitted to appear at the Board of Commissioners' hearing and were permitted to contest the annexation petition.

14. That the stay order prohibiting Defendant, Richard Mallonn, Auditor of the City of Canton, from presenting application for annexation to the legislative authority of the City of Canton and the legislative authority of the City of Canton from taking action on the annexation petition, be dismissed and that the complaint as filed by the Plaintiffs herein be dismissed, at Plaintiffs' cost.

IT IS SO ORDERED, ADJUDGED, and DECREED.

/s/ WILLIAM R. QUINN
Judge

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed December 18, 1985)

Case No. 84-0145

IN THE COURT OF COMMON PLEAS
OF STARK COUNTY, OHIO

BOARD OF TRUSTEES OF CANTON TOWNSHIP,
Plaintiffs,

vs.

RICHARD MALLONN, AUDITOR OF THE CITY OF CANTON,

and

JAMES W. BOWE, AGENT FOR PETITIONERS,
Defendants.

JUDGMENT ENTRY

This matter having come on before the Court for hearing on the Complaint for Injunction as filed by Plaintiffs against Defendants, and the Court having heard the evidence as offered by the parties, reviewed the exhibits as admitted, and the briefs as filed by the parties, the Court finds that the allegations as set forth by the Plaintiffs are not well taken,

IT IS ORDERED, ADJUDGED, AND DECREED, that the stay order prohibiting Defendant, RICHARD MALLONN, Auditor of the City of Canton, from presenting application for annexation to the legislative authority of the

City of Canton and the legislative authority of the City of Canton from taking action on the annexation petition be dismissed, and that the Complaint as filed by the Plaintiffs herein be dismissed, with prejudice, at Plaintiffs' cost.

/s/ WILLIAM R. QUINN
Judge

28 U.S.C. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

OHIO RULES OF CIVIL PROCEDURE
Rule 30

DEPOSITIONS UPON ORAL EXAMINATION

(A) When depositions may be taken.

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of a witness deponent may be compelled by the use of subpoena as provided by Rule 45. The attendance of a party deponent may be compelled by the use of notice of examination as provided by subdivision (B). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(B) Notice of examination: general requirements; nonstenographic recording; production of documents and things; deposition of organization.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the notice.

(2) If any party shows that when he was served with notice he was unable through the exercise

of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) If a party taking a deposition wishes to have the testimony recorded by other than stenographic means, the notice shall specify the manner of recording, preserving, and filing the deposition. The court may require stenographic taking or make any other order to assure that the recorded testimony will be accurate and trustworthy.

(4) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition.

(5) A party may in his notice name as the deponent a public or private corporation or a partnership or association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The person so designated shall testify as to matters known or available to the organization. This subdivision, (B)(5), does not preclude taking a deposition by any other procedure authorized in these rules.

(C) Examination and cross-examination; record of examination; oath; objections.

Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting

under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means designated in accordance with subdivision (B)(3) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(D) Motion to terminate or limit examinations.

At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(C). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The

provisions of Rule 37 apply to the award of expenses incurred in relation to the motion.

(E) Submission to witness; changes; signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within twenty-eight days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(F) Certification and filing by officer; exhibits; copies; notice of filing.

(1) Upon request of any party or order of the court the officer shall transcribe the deposition. When he transcribes the deposition he shall certify on the deposition that the witness was fully sworn or affirmed by him and that the deposition is a true record of the testimony given by the witness. If any of the parties requests or the court orders, he shall then securely seal the deposition in an en-

velope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall upon payment of his fees promptly file it with the court in which the action is pending or send it by certified mail to the clerk thereof for filing.

Documents and things, unless objection is made to their production for inspection during the examination of the witness, shall be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (a) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (b) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition.

(2) Upon payment therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party requesting the filing of the deposition shall forthwith give notice of its filing to all other parties.

(G) Failure to attend or to serve subpoena; expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith

and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

FEDERAL RULES OF CIVIL PROCEDURE
Rule 30

DEPOSITIONS UPON ORAL EXAMINATION

Rule 30. Depositions Upon Oral Examination.

(a) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision

(b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; NON-STENOGRAPHIC RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and

belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision

(b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) SUBMISSION TO WITNESS; CHANGES; SIGNING. When the testimony is fully transcribed the deposition shall

be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon request of a party, be marked for identification and

service being dismissed first. The annexing municipal corporation shall offer employment in the inverse order of dismissal by the township to such firemen if a vacancy exists in the municipal fire department and if they:

(A) Were full-time paid active members of the township or joint township firefighting force for at least six months prior to dismissal and have made application to the municipal corporation within sixty days after the effective date of dismissal;

(B) Have passed a physical examination as prescribed by the physician of the annexing municipal corporation and meet the requirements necessary to perform firefighting duties;

(C) Meet minimum standards of the municipal corporation with respect to moral character, literacy, and ability to understand oral and written instructions as determined by an interview conducted by the fire department of the municipal corporation. The applicant shall be at least twenty-one years of age on the date of his application.

(D) Are able to qualify for membership in the police and firemen's disability and pension fund.

If no vacancy exists in the municipal fire department at the time of the application referred to in division (A) of this section, the application shall be held until a vacancy occurs. When such a vacancy occurs, the applicant shall be entitled to employment in accordance with the requirements of divisions (A), (B), (C), and (D) of this section. So long as any application for employment has been made and is being held under this section, the municipal corporation shall not fill any vacancy in its fire department by original appointment. If there are individuals who are entitled to reinstatement in the municipal fire depart-

ment and the vacancies therein are insufficient to permit both such reinstatements and employment of all those applying for employment under division (A) of this section, the persons having the greatest length of service, whether with the municipal or township fire department, shall be entitled to fill the vacancies as they occur.

A person employed under this section, upon his acceptance into the municipal fire department, shall be given the rank of "firefighter" and entitled to full seniority credit for his prior service in the township or joint township fire district. He shall be entitled to the same salary, future benefits, vacations, earned time, sick leave, and other rights and privileges as the municipal fire department extends to other employees with the same amount of prior service. He may take promotional examinations only after completion of one year of service with the municipal fire department and after meeting any applicable civil service requirements for such examination.

Compliance with this section is in lieu of compliance with section 124.42 of the Revised Code or any other requirements for original appointment to a municipal fire district.

§ 709.02 Annexation of adjacent territory; petition; owner defined.

The owners of real estate adjacent to a municipal corporation may, at their option, cause such territory to be annexed thereto, in the manner provided by sections 709.03 to 709.11 of the Revised Code. Application for such annexation shall be by petition, addressed to the board of county commissioners of the county in which the territory is located, and signed by a majority of the owners of real estate in such territory. Such petition shall contain:

(A) A full description and accurate map or plat of the territory sought to be annexed;

(B) A statement of the number of owners of real estate in the territory sought to be annexed;

(C) The name of a person or persons to act as agent for the petitioners.

As used in sections 709.02 to 709.21 and 709.38 and 709.39 of the Revised Code, "owner" or "owners" means any adult individual seized of a freehold estate in land who is legally competent and any firm, trustee, or private corporation that is seized of a freehold estate in land; except that individuals, firms, and corporations holding easements are not included within such meanings; and no person, firm, trustee, or private corporation that has become an owner of real estate by a conveyance the primary purpose of which is to affect the number of owners required to sign an annexation petition is included within such meanings.

[§ 709.01.1] § 709.011 Duties of clerks; notification to board of elections.

The clerk or clerk of council of a municipal corporation shall notify the board of elections of all vacancies caused by death, resignation, or otherwise in the elective offices of the municipal corporation. Such notification shall be made in writing and filed not later than ten days after the vacancy occurs with the board of elections of the county or counties in which the municipal corporation is located.

The clerk or clerk of council of a municipal corporation shall notify the board of elections of all changes in the boundaries of the municipal corporation. Such notification shall be made in writing and contain a plat clearly

showing all boundary changes and shall be filed with the board of elections of the county or counties in which the municipal corporation is located within thirty days after such change occurs.

§ 709.03 Petition presented to board of county commissioners; proceedings.

The petition required by section 709.02 of the Revised Code shall be filed in the office of the board of county commissioners and the clerk shall cause the petition to be entered upon the record of proceedings of the board, which entry shall be the first official act of the board on the annexation petition, and shall cause the petition to be filed in the office of the county auditor, where it shall be subject to the inspection of any interested person. The agent for the petitioners shall cause written notice of the filing of the petition with the board of county commissioners and the date of such filing to be delivered to the clerk of the legislative authority of the municipal corporation to which annexation is proposed and to the clerk of each township any portion of which is included within the territory sought to be annexed. Any person who signed the petition for annexation may remove his signature by filing with the clerk of the board of county commissioners a written notice of withdrawal of his signature within twenty days after such a notice of filing is delivered to the clerk of the township in which he resides. Thereafter signatures may be withdrawn or removed only in the manner authorized by section 709.032 [709.03.2] of the Revised Code.

[§ 709.03.1] § 709.031 Fixing time for hearing; review of map.

The board of county commissioners shall set the time and place for hearing the petition, which time shall be

not less than sixty nor more than ninety days after the petition is filed in the office of the county auditor, and shall immediately notify the agent of the petitioners of such time and place. The agent for the petitioners shall cause a notice containing the substance of the petition, and the time and place where it will be heard, to be published once a week for a period of four consecutive weeks in a newspaper of general circulation in the county prior to the time fixed for the hearing, and shall deliver a copy of the notice to the clerk of each township any portion of which is included within the territory sought to be annexed and to the clerk of the legislative authority of the municipal corporation to which annexation is proposed.

The board of county commissioners may, at any time prior to thirty days before the date so fixed for the hearing, refer the description and the map or plat of the territory sought to be annexed to the county engineer for a report upon the accuracy thereof. When so referred to him, the engineer shall, at or before the hearing, make a report in writing to the board upon his findings, which shall not be conclusive upon the board, and failure of the engineer to make his report shall not affect the jurisdiction or duty of the board to proceed.

[§ 709.03.2] § 709.032 Hearing, testimony, and amendments.

The hearing provided for in section 709.031 [709.03.1] of the Revised Code shall be public. Any person may appear, in person or by attorney, and support or contest the granting of the prayer of the petition provided for by section 709.02 of the Revised Code. Affidavits presented in support of or against the prayer of such petition shall be considered by the board.

At the hearing any owner who signed the petition for annexation may appear, and after being sworn as provided by section 305.21 of the Revised Code, testify orally that his signature was obtained by fraud, duress, misrepresentation, or undue influence. Any person may testify orally after being so sworn in support or rebuttal to such prior testimony by the owner. The commissioners, the agent for the petitioners or his attorney, and such owner or his attorney may examine such witnesses, including the owner. If a majority of the county commissioners find that such signature was obtained under circumstances that did constitute fraud, duress, misrepresentation, or undue influence, they shall find the signature to be void, and shall order it removed from the petition as of the time the petition was filed.

The petition may be amended without further notice by leave of the county commissioners with the consent of the agent for the petitioners where such amendment does not add to the territory embraced in the original petition. If any amendment is permitted, whereby territory not before embraced is added, the board shall appoint another time for the hearing, of which notice shall be given as specified in section 709.031 [709.03.1] of the Revised Code.

[§ 709.03.3] § 709.033 Order for annexation.

After the hearing on a petition to annex, the board of county commissioners shall enter an order upon its journal allowing the annexation if it finds that:

(A) The petition contains all matter required in section 709.02 of the Revised Code.

(B) Notice has been published as required by section 709.031 [709.03.1] of the Revised Code.

(C) The persons whose names are subscribed to the petition are owners of real estate located in the territory in the petition, and as of the time the petition was filed with the board of county commissioners the number of valid signatures on the petition constituted a majority of the owners of real estate in the territory proposed to be annexed.

(D) The territory included in the annexation petition is not unreasonably large; the map or plat is accurate; and the general good of the territory sought to be annexed will be served if the annexation petition is granted.

The board of county commissioners shall grant or deny the petition for annexation within ninety days after the hearing set pursuant to section 709.031 [709.03.1] of the Revised Code.

If the board of county commissioners grants the petition for annexation it shall enter on its journal all the orders of the board relating to the annexation and deliver a certified transcript of all orders of the board, signed by a majority of the members of the board, the petition, map, and all other papers on file relating to the annexation proceedings to the auditor or clerk of the municipal corporation to which annexation is proposed.

§ 709.04 Acceptance of territory by annexing municipal corporation.

At the next regular session of the legislative authority of the municipal corporation to which annexation is proposed, after the expiration of sixty days from the date of filing with him as required by section 709.033 [709.03.3] of the Revised Code, the auditor or clerk of such municipal corporation shall lay the transcript and the accompanying map or plat and petition required by such section before

the legislative authority. Thereupon the legislative authority, by resolution or ordinance, shall accept or reject the application for annexation. If the legislative authority fails to pass an ordinance or resolution accepting the application for annexation within a period of one hundred twenty days after the transcript is laid before it by the auditor or clerk, the application for annexation shall be deemed rejected by the legislative authority, unless it has been prevented from acting by a temporary restraining order, a temporary injunction, or some other order of a court.

§ 709.05 Rejection of application; effect. (GC § 3551)

If the resolution or ordinance required by section 709.04 of the Revised Code is a rejection of the application for annexation, no further proceedings shall be had. Such rejection shall not be a bar to application thereafter to the board of county commissioners on the same subject.

§ 709.06 Proceedings when application allowed.

If the resolution or ordinance required by section 709.04 of the Revised Code is an acceptance of the proposed annexation, the auditor or clerk of the municipal corporation to which annexation is proposed shall make three copies, containing the petition, the map or plat accompanying the petition, a transcript of the proceedings of the board of county commissioners, and resolutions and ordinances in relation to the annexation, with a certificate to each copy that it is correct. Such certificate shall be signed by the auditor or clerk in his official capacity, and shall be authenticated by the seal of the municipal corporation if there is any. The auditor or clerk shall forthwith deliver one such copy to the county auditor and one such

copy to the county recorder, who shall make a record thereof in the proper book of records and file and preserve it. The other copy shall be forwarded by the auditor or clerk to the secretary of state.

§ 709.07 Injunction against annexation.

(A) Within sixty days from the filing of the papers relating to the annexation with the auditor or clerk as provided by division (D) of section 707.04 or by section 709.033 [709.03.3] of the Revised Code, any person interested, and any other person who appeared in person or by an attorney in the hearing provided for in section 709.031 [709.03.1] of the Revised Code, may make application by petition to the court of common pleas praying for an injunction restraining the auditor or clerk from presenting the annexation petition and other papers to the legislative authority. The petition of a person interested shall set forth facts showing:

(1) How the proposed annexation adversely affects the legal rights or interests of the petitioner;

(2) The nature of the error in the proceedings before the board of county commissioners pursuant to section 707.04, 709.032 [709.03.2], or 709.033 [709.03.3] of the Revised Code, or how the findings or order of the board is unreasonable or unlawful.

The petition of any other person shall set forth facts applicable to division (A)(2) of this section.

(B) The petition shall be filed and docketed in the office of the clerk of the court of common pleas, naming the auditor or clerk of the municipal corporation to which annexation is proposed and the agent of the petitioners for annexation as defendants, and summons shall be served

in the manner provided in Chapter 2703. of the Revised Code. The auditor or clerk shall not present the annexation application to the legislative authority, and it shall not take any action thereon, until after the final hearing and disposition of such petition if an order staying further proceedings on the annexation is entered by the court of common pleas or a judge thereof and served upon the auditor or clerk.

(C) The court of common pleas shall hear the petition not less than twenty days from the filing thereof, and at the hearing the court may hear evidence upon the matters averred in the petition.

(D) The petition for injunction shall be dismissed unless the court finds the petitioner has shown by clear and convincing evidence that the annexation would adversely affect the legal rights or interests of the petitioner, and that:

(1) There was error in the proceedings before the board of county commissioners pursuant to section 709.032 [709.03.2] or 709.033 [709.03.3] of the Revised Code, or that the board's decision was unreasonable or unlawful; or

(2) There was error in the findings of the board of county commissioners or in the election or certification by the board of elections of the results of the election held pursuant to division (D) of section 707.04 of the Revised Code.

(E) If the court finds all the matters required in divisions (D)(1) and (2) of this section it shall make an order enjoining the auditor or clerk of the annexing municipal corporation from presenting the annexation application and related papers to the legislative authority. Such order shall not be a bar to subsequent applications

to the board of county commissioners for the purpose of annexing the territory involved in the annexation application. The court shall render such judgment as to the payment of the costs incurred in the proceedings of injunction as is just and equitable.

§ 709.08 Proceedings when petition dismissed.

If the court of common pleas makes an order dismissing the petition to enjoin further proceedings, the clerk of the court of common pleas shall immediately forward a certified copy of such order to the auditor or clerk of the municipal corporation, who, at the next regular meeting of the legislative authority, shall lay such transcript, map or plat, and the accompanying petition before such legislative authority, as if no petition had been so presented to the court.

§ 709.09 Proceedings when injunction allowed (GC § 3555)

If the court of common pleas enjoins the auditor or clerk of a municipal corporation from making the report to the legislative authority, a certified copy of the order enjoining the report shall immediately be forwarded by the clerk of the court of common pleas to the auditor or clerk of the municipal corporation, who shall file it with the transcript, map or plat, and petition, and preserve it in his office, and thereupon no further proceedings shall be had in the matter. The order of the court shall not operate as a bar to any applications thereafter to the board of county commissioners for such purpose.

§ 709.10 Effective date and rights of inhabitants.

The annexation shall become effective thirty days after the passage of the resolution or ordinance by the

legislative authority of the municipal corporation accepting annexation, provided that if the resolution or ordinance is subjected to a referendum, the annexation, if approved by the electors, shall become effective thirty days after such approval. The territory annexed is a part of the municipal corporation, and the inhabitants residing therein shall have all the rights and privileges, and shall be subject to the powers, of the municipal corporation as are the inhabitants within the original limits of such municipal corporation.

Supreme Court, U.S.
FILED
DEC 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-901

In the Supreme Court of the United States

October Term, 1985

DWIGHT SHEFFER, LARRY KREBBS, and MICHAEL KREBBS, as Members of the Board of Trustees of Canton Township, Stark County, Ohio,
Petitioners,

vs.

RICHARD MALLONN, Auditor, City of Canton, Ohio and JAMES BOWE, Agent for Annexation Petitioners,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the United States Supreme Court re-examine its clear and unequivocal holding in *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907), that the Fifth and Fourteenth Amendments of the Federal Constitution do not apply to state annexation statutes when this decision was reviewed and reaffirmed in the 1978 decision *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978)?

2. Assuming arguendo that the Court should radically modify or overrule *Hunter* and *Holt,* does a hearing which puts no limitation on the length of direct testimony, rebuttal testimony, summation and commenting on the evidence, and which allows Petitioners to be represented by counsel, afford Petitioners adequate due process protection?

3. Assuming arguendo that the Court should radically modify or overrule *Hunter* and *Holt,* should Petitioners be barred from raising constitutional questions before the United States Supreme Court where such issues were not raised in the appeal before the state court?

4. Assuming arguendo that the Court should radically modify or overrule *Hunter* and *Holt,* is the denial of cross-examination and subpoenas harmless error where the state law standard for granting an annexation is clearly met?

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No. 85-901

In the Supreme Court of the United States

October Term, 1985

DWIGHT SHEFFER, LARRY KREBBS, and MICHAEL KREBBS, as Members of the Board of Trustees of Canton Township, Stark County, Ohio,
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vs.

RICHARD MALLONN, Auditor, City of Canton, Ohio and JAMES BOWE, Agent for Annexation Petitioners,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

COUNTERSTATEMENT OF THE CASE

Petitioners seek this Writ of Certiorari from the decisions of all levels of courts of the State of Ohio and the Board of County Commissioners of Stark County, Ohio, which granted the request of all landowners in the territory to be annexed.

In June of 1983, a petition for annexation to the City of Canton was filed with the Board of County Commissioners seeking the annexation of 163.21 acres of land in Canton Township. The petition was unanimously signed by all landowners in the territory.

The land is 163.21 acres of industrial land which the landowners want to develop, but development is prevented due to the limitation of the Township to provide the necessary services. The land is held by six (6) different entities, all of which signed the annexation petition and continue to support annexation.

A public hearing was held by the Board of Stark County Commissioners on the petition for annexation on August 24, 1983. The hearing was extensive, and every individual wishing to be heard was permitted to speak. The annexation petition was approved by a resolution of the Board of Stark County Commissioners on November 22, 1983, as being in the best interest of the territory to be annexed and filed with the City of Canton on November 29, 1983. On January 27, 1984, the Appellant filed a complaint for an injunction seeking to block the annexation that had been unanimously requested by the landowners and approved by the Commissioners.

Petitioners correctly note that the Trial Court and the Fifth Ohio Appellate District concluded that the annexation was proper and the Ohio Supreme Court refused to hear the appeal on July 31, 1985.

Petitioners incorrectly state that the Fifth Ohio Appellate District rejected the federally grounded constitutional challenges made in the Trial Court. As specifically noted in their opinion, only two errors were assigned on appeal. Those errors centered around whether legal rights or interests were impaired (taxes, maintenance of roads, and similar issues) and whether the resolution passed by the Board of County Commissioners met the statutory requirements. Those were the only issues up on review. The Court did attach the Findings of Fact and Conclusions of Law of the Trial Court, but those issues were not

raised or argued on appeal, nor were they discussed in the decision of the Appellate Court. (See Opinion of the Court of Appeals for Stark County, Ohio, Petitioners' Appendix A4.)

Thus, Petitioners, as the Board of Trustees of Canton Township, seek to deny an annexation requested by all landowners in the area to be annexed and that has been ruled to be in the best interest of the territory to be annexed by the Board of Stark County Commissioners and all three (3) levels of courts of the State of Ohio.

SUMMARY OF ARGUMENT

Petitioners' attempt to characterize the well-settled law on point as ripe for review is totally unfounded. Not only does the *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), decision unequivocally state that no provision of the Federal Constitution applies to state annexation matters, the validity of this decision has been maintained by strict adherence in the lower federal courts. Even more importantly, this Court recently confirmed the "constitutional significance" of *Hunter*. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). Consequently, Petitioners' reliance on the due process and equal protection clauses of the Federal Constitution is misplaced.

Even if Petitioners' constitutional argument had any merit, the Supreme Court has no jurisdiction in this case because the federal constitutional question was not raised at every level of review in the courts below. In particular, the Court of Appeals of Ohio was not afforded the opportunity to review and decide the constitutional issues now placed before the Supreme Court because Petitioners did not raise these issues in the appeal.

Even if the jurisdictional obstacle is somehow overcome, the procedural process afforded Petitioners in this instance comports with the due process requirements of the Federal Constitution. The procedural protections in the hearing afforded Petitioners were more than adequate to protect any property interests that they might have had in the state annexation case.

Even if there is a constitutional right implicated, denial of cross-examination and subpoenas is harmless error. Ohio law requires that the wishes of the property owners be granted in an annexation case. In this case, the property owners unanimously desire annexation.

REASONS FOR DENYING THE WRIT

I. THE UNITED STATES SUPREME COURT HAS NO REASON TO RE-EXAMINE HUNTER v. CITY OF PITTSBURGH, 207 U.S. 161 (1907), SINCE THIS COURT REVIEWED AND REAFFIRMED THAT DECISION IN THE RECENT CASE OF HOLT CIVIC CLUB v. CITY OF TUSCALOOSA, 439 U.S. 60 (1978).

The holding in *Hunter* that no provisions of the Federal Constitution apply to state annexation issues is in line with mainstream constitutional analysis. Petitioners' claim that the Fifth and Fourteenth Amendments of the United States Constitution apply to state annexation matters has been rejected by numerous lower federal courts in the 70 years since the *Hunter* decision. In fact, this Court recently rejected such a claim. *See Holt Civic Center v. City of Tuscaloosa*, 439 U.S. 60 (1978).

The Court in *Hunter* ruled that the due process and equal protection clauses of the Fourteenth Amendment do not apply to state annexation cases. This Court explained that annexation matters fall entirely within the discretion and standards of the state constitution. The state has the sole control of its political subdivisions and may create, modify, or destroy them as its own state constitution permits. Moreover, Petitioners' argument that the due process clause works to protect and preserve the tax base of the Township, is totally without merit. The Court in *Hunter* specifically ruled that nothing in the Federal Constitution protects property owners from the injurious consequences of annexation, including the burden of increased taxation:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies,

> expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do so as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907).

Petitioners cannot even point to conflict within the lower federal courts concerning the application of *Hunter*. On the contrary, the carefully reasoned rationale of *Hunter* has consistently been applied by all the lower federal courts, including a case upholding the constitutionality of the Ohio Statute. *See, e.g., Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984) ("No federal constitutional principle may be invoked to invalidate Ohio Revised Code Section 709.033 on equal protection or due process grounds in the face of the strong affirmation of state power over its subdivision of government as set forth in *Hunter* and *Holt* . . ." *Id.* at 290); *Township of Jefferson v. City of*

West Carrollton, 517 F. Supp. 417 (S.D. Ohio 1981), *aff'd,* 718 F.2d 1099 (6th Cir. 1983) (the *Hunter* case ". . . reflects a viable principle of law that annexation matters fall entirely within the discretion and standards of the state constitution. . ." *Id.* at 419); *Detroit Edison Company v. East China Township School District No. 3,* 378 F.2d 225 (6th Cir. 1967), *cert. denied,* 389 U.S. 932 (annexation procedure is a legislative matter and not justiciable under the due process or equal protection clauses of the Fourteenth Amendment, Federal Constitution); *Hammonds v. City of Corpus Christi,* 343 F.2d 161 (5th Cir.), *cert. denied,* 382 U.S. 837 (1965); *International Harvester Co. v. Kansas City,* 308 F.2d 35 (10th Cir. 1962), *cert. denied,* 371 U.S. 948 (1963); *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F.2d 321 (6th Cir.), *cert. denied,* 389 U.S. 975 (1965).

Of primary importance, however, is the fact this Court recently confirmed the constitutional validity of *Hunter.* In *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978), the Court reviewed its earlier recognition that political subdivisions are created by the state as convenient agencies for exercising such other governmental powers of the state as may be entrusted to them. The Court concluded, ". . . we think that the case [*Hunter*] continues to have substantial constitutional significance in emphasing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them." *Id.,* at 71 (Footnote omitted).

In unequivocal language, the Court, in 1978, endorsed the constitutional validity of *Hunter.*[1] Only Petitioners'

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1. The two narrow exceptions to *Hunter* are not appicable on our facts. *Hunter* has been modified to avoid deliberate ma-

(Continued on following page)

complete disregard of the *Holt* decision allows Petitioners to make the argument that *Hunter* should be reversed by the Supreme Court at this time.

II. ASSUMING ARGUENDO THAT THE COURT SHOULD RADICALLY MODIFY OR OVERRULE HUNTER AND HOLT, THE HEARING, WHICH PUT NO LIMITATION ON THE LENGTH OF DIRECT TESTIMONY, REBUTTAL TESTIMONY, SUMMATION AND COMMENTING ON THE EVIDENCE, AND WHICH ALLOWED PETITIONERS TO BE REPRESENTED BY COUNSEL, AFFORDED PETITIONERS DUE PROCESS OF LAW.

The procedural protections afforded Petitioners in the case at hand went beyond the requirements of due process. Ohio law secured to Petitioners the right to a public hearing. O.R.C. §§709.031 and 709.032. It gave the Petitioners the right to representation by counsel at the hearing. O.R.C. §709.07. Moreover, the due process afforded to Petitioners encompassed the right to unlimited direct testimony. It encompassed the right to unlimited rebuttal testimony. It encompassed the right to unlimited summation and commenting on the evidence. These procedural safeguards were more than necessary to protect

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Footnote continued—

nipulation of municipal boundaries for purposes of race discrimination in voting. *See Gomillion v. Lightfoot,* 364 U.S. 339 (1960). Petitioners attempt to characterize the case at hand as analogous to *Gomillion* cannot withstand analysis.

Also, two Supreme Court cases have held that where the state agreed to have important municipal decisions made by votes, the equal protection clause must be applied to all within the jurisdiction whose rights are affected. *Kramer v. Union School District,* 395 U.S. 621 (1969); *Cipriano v. City of Houma,* 395 U.S. 701 (1969).

any property interests that Petitioners may have had in the state annexation procedure.

As the Court in *Cleveland Board of Education v. Loudermill,* 84 L. Ed. 2d 494 (1985) noted, once it is determined that the due process clause applies, the question remains what process is due. *See also, Morrissey v. Brewer,* 408 U.S. 471 (1971). The interpretation and application of the due process clause are practical matters and "[t]he very nature of due process negates any concept of inflexible procedures universally applied to every imaginable situation." *Goss v. Lopez,* 419 U.S. 565, 578 (1975); *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961).

Consequently, Petitioners' assertion that if one is accorded due process rights he automatically is given the right to subpoena witnesses and cross-examine witnesses, simply cannot withstand constitutional analysis. Certainly, the right of confrontation and cross-examination are necessary in some situations. *See, Goldberg v. Kelly,* 379 U.S. 254 (1970). However, the Court in *Goss v. Lopez,* 419 U.S. 565, 578 (1975), recognized that due process requires that at a minimum, deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case.*

The type of notice and the nature of the hearing depend on the accommodation of the competing interests involved. *Goss v. Lopez,* 419 U.S. 565 (1975); *Matthews v. Eldridge,* 424 U.S. 319 (1976). In *Goss,* for example, the Court ruled that due process in connection with a school suspension of ten days or less requires at least rudimentary procedures. Such rudimentary procedures demand only notice and an informed hearing allowing the student to give his side of the story. In *Parham v.*

J.R., 442 U.S. 584 (1979), this Court ruled that due process does not require a formal hearing in determining whether a child may be involuntarily committed to a mental institution.

From these few examples, it is obvious that the nature of due process negates any concept of inflexible procedures universally applied to every situation. *See, generally, Cleveland Board of Education v. Loudermill,* 84 L. Ed. 2d 494 (1985). In the case at hand, the Petitioners were given sufficient procedural protections. The process afforded them complied with the due process necessary in a state annexation case. Additional rights would not have decreased the risk of error in such proceeding. Consequently, the state procedure afforded Petitioners a fair hearing.

III. THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO CONSIDER CONSTITUTIONAL QUESTIONS THAT WERE NOT RAISED BY PETITIONERS IN THE STATE COURTS.

The Court of Appeals for Stark County, Ohio, noted that only two (2) errors were assigned on appeal to that Court. As that Court stated:

> "Bench trial was held in the Court of Common Pleas of Stark County, following which the court issued separate findings of fact and conclusions of law and dismissed the complaint for injunction. The trustees' appeal, assigning two (2) errors:
>
> I. THE TRIAL COURT ERRORED (SIC) IN FINDING THAT APPELLANTS FAILED TO PROVE THAT ITS LEGAL RIGHTS OR INTERESTS WERE IMPAIRED BY THE ANNEXATION.

II. THE TRIAL COURT ERRORED (SIC) IN FINDING THAT THE RESOLUTION PASSED BY THE STARK COUNTY BOARD OF COMMISSIONERS MET ALL THE REQUIREMENTS OF O.R.C. 709.033." (See Opinion of the Court of Appeals for Stark County, Ohio, at Petitioners' Appendix A5.)

Thus, it is clear that the only issues raised on appeal were whether Petitioners proved that their legal rights were impaired (Issues centering around taxes, road improvements, and the like.) and whether the resolution met the statutory prerequisites. No constitutional issues were raised by Petitioners in their appeal in the Ohio Court of Appeals. Thus, this Court may not consider these constitutional issues on appeal. As this Court has noted, it will not consider questions that were not argued throughout the state courts. "The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so." *Adler v. Board of Education,* 342 U.S. 485, 496 (1952). This Court has held that the constitutional issue must have been drawn to the attention of the state court and considered by it. *Capital City Dairy Co. v. Ohio,* 183 U.S. 238 (1902).

It is clear that in this case the constitutional questions were not considered. As noted in the text of the Court of Appeals opinion cited above, the constitutional issues were not raised, and a thorough review of that decision reveals that the constitutional issues were not considered by the Court of Appeals. The constitutional questions must actually be considered as noted in the *Capital City* case cited above. In this case, the Court of Appeals merely incorporated the Separate Findings of Fact and Conclusions of Law of the Trial Court and did not actually consider each

one of those elements as the Petitioners did not raise the constitutional questions in the Court of Appeals.

Even the case cited by Petitioners in support of jurisdiction supports the position that there is no jurisdiction in this case. *Charleston Federal Savings & Loan Association v. Alderson,* 324 U.S. 182 (1944), continues on to say that there must "be an explicit and timely insistence in state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties, or laws." *Id.*, at page 185.

It is clear that these constitutional issues were not raised in the court of appeals in Ohio. The Ohio courts were not presented with the opportunity to review this constitutional question; thus, the United States Supreme Court may not consider the issue as it is without jurisdiction to do so.

IV. ASSUMING ARGUENDO THAT THERE IS A CONSTITUTIONAL RIGHT TO SUBPOENA AND CROSS-EXAMINE WITNESSES IN AN ANNEXATION HEARING, DENIAL OF THAT RIGHT IS HARMLESS ERROR WHERE ALL RELEVANT EVIDENCE REQUIRES THAT THE ANNEXATION BE GRANTED.

Even in cases in which there is a constitutional violation, such constitutional violation is not fatal where it is harmless error. This is true even in the criminal procedure context, which is certainly more protective of rights than matters deailng with annexation of territories to municipalities. If we are to draw an analogy between the right of cross-examination and subpoenas in this case to a criminal right, it would be to the right of confrontation, that is, the right to cross-examine the witnesses against you.

Even in the criminal context with its higher standard, there may be harmless error in the denial of the right of confrontation. Of course, such a standard is not applied in annexation matters, but even if it was, there was only harmless error in this case.

The denial of the right of confrontation is harmless error if it is clear beyond a reasonable doubt that the conviction would have been sustained even in the absence of the error that was committed. *Harrington v. California*, 395 U.S. 250 (1969).

Applying this much higher standard from the criminal context to the instant case, it is clear that even if there were some right to cross-examination and subpoenaing of witnesses in an annexation hearing, that it was harmless error in this case. That is because Ohio law requires granting of an annexation where the landowners desire an annexation, even if the annexation will be solely to their benefit and to the detriment of surrounding territory. *Lariccia v. Board of Commissioners*, 38 Ohio St.2d 99 (1974); *In re: Kucharski*, 56 Ohio App.2d 121 (Montgomery 1977); *In re: Char*, 59 Ohio App.2d 146 (Montgomery 1978).

In this case, the landowners unanimously request annexation; and under the Ohio standard, the annexation would have been granted regardless of what witnesses would have been subpoenaed, what questions would have been asked, and what the answers would have been. Where the landowners desire annexation, even if it is solely for their commercial benefit and will be to the detriment of the surrounding territory, the annexation must be granted. This is the law of the State of Ohio and, thus, the annexation would have been granted; and it was clearly harmless error, if error at all, to deny subpoenas and the right of cross-examination.

CONCLUSION

State annexation matters present no issue of constitutional dimension under the due process and equal protection clauses of the United States Constitution. Moreover, even if the Federal Constitution was somehow implicated in the case at hand, Petitioners were afforded procedural safeguards sufficient to protect any property interests that they might have had in the state annexation case. This Court does not have jurisdiction of the matter because the constitutional question was not raised in the state courts. Further, even if it is assumed that there was a constitutional error, it is harmless error as the annexation would have been granted because all property owners desired annexation. For these reasons, Petitioners' petition for a writ of certiorari should be denied.

Respectfully submitted,

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